(1)

99 422 SEP 7 1999

No. 99-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourteenth Amendment Due Process Clause imposes any limitations upon a state trial court's denial of a motion for out-of-state counsel to appear *pro hac vice,* when the timing of the denial of such motion affects the fairness of the proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280 (1912) 11

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 10

Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930) 11

Curtis v. Bennett, 351 F.2d 931 (8th Cir. 1965) 7

Eddings v. Oklahoma, 455 U.S. 104 (1982) 4

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 10

Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963) 8

Lamb's Chapel v. Center Moriches Union Free Sch. Dis., 508 U.S. 384 (1993) 5

Morrissey v. Brewer, 408 U.S. 471 (1972) 8

Powell v. Alabama, 287 U.S. 45 (1932) 9

Reich v. Collins, 513 U.S. 106 (1994) 11

Ward v. Bd. of County Comm'rs of Love County, 253 U.S. 17 (1920) 11

CONSTITUTION

U.S. Const. amend. XIV, § 1 ..... *passim*

OTHER AUTHORITIES

Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699 (1975) 10

16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 4025 11

PETITION FOR WRIT OF CERTIORARI

Marshall Spiegel petitions for a writ of *certiorari* to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the New York Supreme Court, Appellate Division, is unreported but is reprinted in the Appendix at 1. The order of the New York Court of Appeals denying Spiegel's motion for leave to appeal is also unpublished. It is reprinted at App. 7.

JURISDICTION

On February 23, 1999, the New York Supreme Court, Appellate Division, entered an Order denying Spiegel's appeal of the Decree of the Surrogate Court, New York County. On June 8, 1999, the New York Court of Appeals denied a motion for leave to appeal that decision. The deadline for filing a petition for writ of *certiorari* in this Court is September 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property,

without due process of law . . . . " U.S. CONST. amend. XIV, § 1.

STATEMENT

The underlying procedural context of the instant case is a matter before the Surrogate Court, New York County, to admit the will of one Abraham Warsaski to probate. Petitioner Marshall Spiegel, one of the sole surviving heirs of Warsaski, objected to the admission of the will on the ground that Warsaski lacked testamentary capacity. The case proceeded to trial on objections to that effect.

In May 1997, several months before the trial began, Spiegel's then-counsel, Richard Leng, withdrew from the case. Leng, an Illinois attorney not licensed in New York, had been admitted *pro hac vice* by the Surrogate Court. The court, which permitted Leng's withdrawal over Spiegel's objection, indicated that substitute counsel would be given leave to appear in Leng's stead if an association were arranged with a New York attorney who would serve as counsel of record. Specifically, the court noted a change in New York's rules for admission *pro hac vice* such that "any court, in its discretion, may admit an out-of-state attorney to participate in any matter, but that no attorney may be admitted *pro hac vice* unless he or she is associated with an attorney who is a member of the New York bar. . . . " App. 3. Thus, "[t]he objectants are advised that this Court will not admit another out-of-state attorney unless associated with a New York attorney who shall be counsel of record." *Ibid.* The proceeding was stayed so that Spiegel could retain new counsel. The

Surrogate Court at the same time notified the parties that a jury was to be selected on September 5, and the trial to begin on September 8, 1997. *Ibid.*

Spiegel's replacement counsel was Daniel Meenan, also an Illinois lawyer, and a longtime attorney for Spiegel. Meenan lodged his request for admission *pro hac vice* and immediately began to prepare for trial. When the Surrogate Court entered an order to the effect that Meenan would be admitted upon the co-appearance of a licensed New York attorney, that appearance was promptly filed.

Several weeks prior to the date for which trial was set, Spiegel's New York attorney inquired with the Surrogate Court to confirm that Meenan had been, or soon would be, formally granted leave to appear in the case as Spiegel's lead trial counsel. Only at that juncture was Spiegel advised that the court would not admit Meenan. Until that point, Spiegel's Illinois attorney had prepared the case for trial and had planned to proceed.

The Surrogate Court ultimately dismissed Spiegel's objections, and admitted the propounded instrument to probate as the Last Will and Testament of the deceased. With respect to Spiegel's contention that the denial of Meenan's *pro hac vice* status worked an unfairness to the prejudice of Spiegel, the trial court simply recited that the May 1997 decision in which the court instructed Spiegel as to the procedure for Meenan's appearance "also notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997." App. 4. Thus, concluded the court, "the record clearly establishes that objectants have had ample opportunity to

conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." *Ibid.*

Spiegel appealed the Surrogate's adverse decision to the New York Supreme Court, Appellate Division, urging *inter alia* that the Surrogate Court's refusal to admit Meenan *pro hac vice*, and the court's failure to timely advise Spiegel of that decision, compromised the trial's fairness. The New York Supreme Court rejected that argument on the ground that Spiegel "was given sufficient notice by the Surrogate of the firm trial date to justify the Surrogate's denial of [Spiegel's] request for an adjournment by reason of his out-of-State attorney's scheduling conflict." App. 2.

The New York Court of Appeals subsequently denied without discussion Spiegel's motion for leave to appeal the Supreme Court's ruling.[1] App. 7.

---

[1] While Spiegel did not cite the Fourteenth Amendment Due Process Clause in his briefs below as a reason for reversing the trial court's holding, the principle of fundamental fairness that is the essence of due process was clearly in play. This Court has recognized that the obligation to *adequately* raise federal claims in state court does not mean that such claims must be framed *perfectly*. "Our jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982).

REASONS FOR GRANTING THE PETITION

When fundamental values collide, "hard cases" are born. When fundamental values collide recurrently, and recurrently implicate a basic constitutional protection, this Court's intervention is often necessary to adjust or clarify the ground rules of the underlying litigation. Left unconsidered, the resulting state of affairs is intolerable because incoherence in the rule of law – the mishmash of principles aptly described by Justice Scalia in a different context as a "geometry of crooked lines and wavering shapes," *Lamb's Chapel v. Center Moriches Union Free Sch. Dis.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring, joined by Thomas, J.) is a genuine breach of justice.

This case offers the Court an opportunity to examine a collision of two such forces which today recurs at an increasing rate in state and federal courts alike: On one hand, the traditional principle that trial courts have unfettered discretion to control their proceedings; and on the other, the right of litigants to legal counsel of their choice.

The resolution of this conflict is vitally important. In an era when interstate law practice and multistate law firms is commonplace, is a trial court's denial of a *pro hac vice* motion *ever* constitutionally justiciable, or is the trial judge's discretion truly absolute? Does the Due Process Clause of the Fourteenth Amendment *ever* apply to trial court rulings of this sort? Does a lawyer *ever* have a constitutionally protected interest in his out-of-state practice? Or to the contrary, is the interest of a litigant in counsel of his choice, or the interest of his lawyer in out-of-state practice, always so trivial that a state court judge

literally has no obligation to consider the merits of a *pro hac vice* request, or to articulate a principled basis for denying a *pro hac vice* motion?

A. The Implicit Premises of the Lower Courts' Rulings. In the instant case, the lower courts provided no coherent rationale for rejecting Meenan's application for *pro hac vice* status, underscoring their orientation that denial of *pro hac vice* motions is wholly within the unlimited discretion of the trial judge. The Surrogate Court's response to Spiegel's objection that the timing and disposition of Meenan's motion compromised the fairness of the trial illustrates this. The trial court merely noted that the May 29, 1997 decision permitting Richard Leng's withdrawal also "stayed [the proceeding] so that objectants could retain new counsel," and "notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997." App. 4. From these grounds, the court concluded that "objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." *Ibid.*

With due respect, we are at a loss to understand the Surrogate Court's logic. Meenan filed his request for *pro hac vice* status immediately upon the dismissal of Leng from the case. He thereafter began preparing for trial in rational reliance upon the Surrogate Court's instructions, specifically, that securing *pro hac vice* admission would not be a problem so long as New York counsel were also engaged. Thus, the court's suggestion that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial," App. 4, is

nonsensical. The trial's unfairness was not self-inflicted; it was a result of the Surrogate Court's action with respect to Meenan's motion for admission.

For the same reason, the New York Supreme Court's rejection of Spiegel's contention on the ground that Spiegel "was given sufficient notice by the Surrogate of the firm trial date", App. 3, to justify the Surrogate's anomalous management of the case, misses the essential point.

Indeed, so strikingly illogical are the lower courts' glosses on Spiegel's argument, that it appears the courts employed a rationale that they did not in fact make explicit. The unspoken premises of these rulings are as follows: A nonresident lawyer has no right, as a matter of either state or federal law, to appear in a New York Court. Absent any such enforceable entitlement, based on an explicit rule or mutual understanding, the lawyer's interest in making a *pro hac vice* appearance is a mere "privilege" that New York may grant or withhold in the unrestrained discretion of individual judges. The conclusion that a party has no constitutional protection against a capricious exclusion of his counsel of choice can hardly follow from any alternative line of thought than this.

This view is reminiscent of similar syllogisms which the Court has long since repudiated – for instance, the notion that a parolee has no constitutionally protected interest in his status, a view which had its adherents well into this century. *See, e.g., Curtis v. Bennett*, 351 F.2d 931, 933 (8th Cir. 1965) ("A parole is a matter of grace, not a vested right. . . . [D]iscretion is left to the States as to the manner and terms upon which paroles may be granted

and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard"); *see also, Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir. 1963), *cert. denied sub nom. Jamison v. Chappell*, 375 U.S. 957 ("In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege").

But in *Morrissey v. Brewer*, 408 U.S. 471 (1972) this Court, while accepting the premise that the parolee has no "right" to preserve his contingent liberty, nevertheless ultimately concluded that the nature of his status, coupled with the State's "implicit promise" that it would not be revoked arbitrarily, was sufficient to require constitutional protections. *Id.* at 481-482. As the Court observed, it "is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' " *Id.* at 482.

Although the instant case arises in a purely civil context, the analytical "gestalt shift" exemplified in cases such as *Morrissey v. Brewer*, is instructive. It is equally futile to attempt to deal with the problem presented by this case in terms of whether Petitioner's interest in his out-of-state lawyer's *pro hac vice* admission is based on an explicit or an enforceable entitlement, rather than a privilege. Instead, we must examine the nature of the out-of-state attorney's activity and the representation the Surrogate Court made to Spiegel regarding the prospect of Meenan's admission.

B. Due Process Principles Are Implicated by a Trial Court's Disposition of a Pro Hac Vice Motion. It is well

established, of course, that state trial courts have broad discretion to implement rules necessary to carry out the conduct of their business. This authority includes the regulation of *pro hac vice* admissions. But that discretion is not categorically unfettered. Where there is no indication that the out-of-state attorney is unqualified; where the court expressly instructs the affected party as to the procedure that would lead to the out-of-state lawyer's admission and those instructions are followed; where the trial court gives no indication that the motion for admission is problematic; and where the court is aware that, not only the party himself but also the associated state-licensed counsel, are relying upon out-of-state counsel's role in the case – it strains the most basic intuitions of procedural fairness to conclude that the court may nonetheless deny the *pro hac vice* motion for no discernible reason except that the court has the "discretion" to do so.

More than sixty years ago this Court recognized a due process right to retained counsel in civil proceedings. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). If a state court may not arbitrarily prohibit retained counsel's presence in a courtroom, regardless of the state's rules of court, it is difficult to see why the same court's absolute power to deny a *pro hac vice* motion without any underlying rationale should not implicate due process.

Indeed, the notion that a state trial judge has arbitrary and unlimited power to refuse a nonresident lawyer

permission to appear in his courtroom, whatever grounding may once have supported it, is a remnant of a bygone era. Like the body of rules that once governed parole, the nature of law practice has undergone a metamorphosis during the past century. Work that was once the exclusive province of lawyers is now performed by title companies, real estate brokers, corporate trust departments, and accountants. Rules of ethics that once insulated the local lawyer from competition are now forbidden by the Sherman Act, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-784 (1975), and by the First Amendment to the federal Constitution, *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (Lawyers have a constitutional right to advertise because "significant societal interests are served by such speech"). Interstate law practice and multistate law firms are now commonplace. This is in part a "reflection of the growing general complexity of our society, . . . the gradual change in the character of law practice from a generalist skill to an increasingly specialized one; hence, the emergence of lawyers regarded and operating as . . . specialists . . . equipped to cope with problems that transcend jurisdictional boundaries and the legal competence of local generalists." Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699, 699-700 (1975) (footnote omitted).

* * *

A state may not construe its own laws in a manner that denies an effective remedy for the vindication of rights under the federal Constitution, including perhaps most fundamentally, the right to due process. Thus, it is well established that state procedural rulings cannot be found to be independent of a claim that the procedural

rulings themselves cause a denial of due process. *See* 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 4025. Likewise, due process interests have been implicated in cases that center on the failure of a state court to provide a remedy for infringement of a federal right. *See, e.g., Ward v. Bd. of County Comm'rs of Love County*, 253 U.S. 17 (1920); *see also Reich v. Collins*, 513 U.S. 106 (1994) (due process requires a "clear and certain" remedy for taxes collected in violation of federal law) (citing *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930) (due process violated when state court denied injunction against collection of unlawful taxes on basis of taxpayer's failure to pursue administrative remedies, where State's prior 'settled law' made clear that no such remedies existed).

New York state court judges routinely permit out-of-state counsel to appear *pro hac vice*. While it is unquestionably true that a New York trial judge has broad discretion in determining whether or not to allow non-resident lawyers to appear in his court, it is also true that New York rules, precedents, and practice give out-of-state lawyers an unequivocal expectation that the exercise of that discretion will be based on permissible reasons. New York thus has implicitly assured out-of-state practitioners that they are welcome in New York's courts unless there is a valid, articulable reason for excluding them. The state's assurance is adequate to create an interest that qualifies as protected within the meaning of the Due Process Clause. A state trial court's authority to

exercise discretion simply does not include the power to act arbitrarily.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 7, 1999

Sullivan, J.F., Ellerin, Williams, Wallach, JJ.

311

Probate Proceeding,
Will of Abraham Warsaski,
Deceased,
Proponent-Respondent.

-against-

Marshall Spiegel,
Objectant-Appellant,

-and-

Michael Spiegal,

Objectant-Respondent.

Steven E. Rosenfeld
Pro se

Decree, Surrogate's Court, New York County (Renee Roth, S.). entered on or about October 16, 1997, which upon, *inter alia*, the surrogate's direction of a verdict dismissing the remaining objection to probate premised on the deceased's alleged lack of testamentary capacity objection, admitted the propounded instrument to probate as the Last Will and Testament of the deceased, unanimously affirmed, with costs.

The Surrogate properly refused to admit in evidence the manuscripts offered by the objectant to establish lack of testamentary capacity. Objectant could not authenticate them due to the strictures of CPLR 4919. Nor was there any waiver of those strictures effected by the attorney-executor's testimony, since the attorney-executor did not testify to any transactions between the deceased and the objectant, and since, as the attorney who prepared the will, he was permitted to testify about the circumstances surrounding the will's preparation (*see*, CPLR 4503(b);

Matter of Wood, 52 NY2d 139). Furthermore, there was no proof of intentional destruction of any relevant documents.

Finally, objectant was given sufficient notice by the Surrogate of the firm trial date to justify the Surrogate's denial of objectant's request for an adjournment by reason of his out-of-State attorney's scheduling conflict.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 23, 1999

/s/ Catherine O'Hogan Wolfe
CLERK

SURROGATE'S COURT : NEW YORK
STATE COUNTY OF NEW YORK
----------X
Probate Proceeding, Will of

ABRAHAM WARSASKI, Filed No. 4323/93

Deceased.
----------X

ROTH, S.

After trial before a jury in this contested probate proceeding in the estate of Abraham Warsaski, the Court directed a verdict in proponent's favor and dismissed the objection to probate.

Mr. Warsaski died on May 19, 1993, at age 66, survived by two nephews, Marshall Spiegel and Michael Spiegel, as his sole distributees. Under the propounded instrument, dated September 15, 1992, testator left his entire estate to charity and specifically disinherited his nephews. In addition to the propounded instrument, testator had executed three prior wills, in 1991, 1990 and 1986, in which he also left his estate to charity and specifically disinherited his nephews.

The nephews filed objections to probate in December 1993. By decision dated December 28, 1995, this Court dismissed all of their objections, except the one as to testamentary capacity. At trial, objectants failed to present any proof to support their allegation that decedent suffered from an insane delusion sufficient to raise a question of fact for consideration by the jury.

Objectants complained that they had inadequate opportunity to prepare for trial and conduct pre-trail [sic]

discovery. This proceeding, however, has been pending for almost four years and objectants' former attorney conducted extensive pre-trial discovery. The matter was originally scheduled for trial in 1996, but was adjourned until March 1997, at which time it was again adjourned because of the actual engagement of proponent's counsel. Thereafter, objectants' former counsel sought leave to withdraw. By decision dated May 29, 1997, the attorney's application was granted and the proceeding was stayed so that objectants could retain new counsel. Such decision also notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997. Thus, the record clearly establishes that objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial.

At trial, objectants failed to lay a proper foundation for the introduction into evidence of xerox copies of typewritten papers, allegedly typed by decedent, some of which purportedly also contained his signature or handwriting. The proposed opinion of objectant's expert, a psychiatrist, was based on these writings. Because the relevancy of these writings depended upon their authorship by decedent, proof of their authenticity was required. Although copies of some of the writings were attached to proponent's papers on his previous motion for summary judgment, he had never conceded their authenticity or admissibility but rather argued that they could not constitute the basis for an expert's opinion even if they were decedent's writings. In its decision denying

summary judgment to proponent on the issue of testamentary capacity, this Court was required to view the proffered evidence in the light most favorable to objectants and stated:

> "No proof has been offered that the writings are of a kind accepted in the profession as reliable in forming a psychiatric opinion, but, *for purposes of this motion*, the court *assumes, without deciding*, that these letters and other materials were written by decedent and that they would be admissible at trial." (emphasis added) (*Matter of Warsaski*, NYLJ, Jan. 4, 1996 at 27, col 2; reargued and adhered to, NYLJ, Feb. 15, 1996 at 29, col 3, affirmed in 228 AD2d 275).

During the trial, objectants requested an adjournment so that they could obtain handwriting experts and other witnesses who allegedly would be able to identify decedent's handwriting on the xerox copies. As previously noted, however, objectants had more than enough time to obtain such witnesses prior to trial, but had failed to do so.

The psychiatrist called by objectants had never met or treated decedent or examined his medical records. Because the papers which formed the basis for his opinion were not in evidence, his testimony was excluded. As the Court of Appeals has held " . . . opinion evidence must be based on facts in the record or personally known to the witness. . . . " (*Cassano v. Hagstrom*, 5 NY2d 643, 646). Neither element was present here.

Nor could the expert's opinion be established by posing hypothetical questions. Such questions may assume the existence of facts that may be fairly inferred

from the evidence, "[b]ut a question which assumes a material fact which has no support in the evidence is improper and must be excluded" (*see*, Price, Richardson on Evidence, §7-310 at 474 [11th ed., Farrell, 1995]). The record was devoid of any evidence upon which the expert's opinion, or a proper hypothetical question, could be based.

The proof establishes that the propounded instrument is genuine, that it was validly executed and that at the time of execution the decedent was competent to make a will and not under restraint (EPTL 3-2.1; SCPA 1408). Accordingly, the propounded instrument is admitted to probate.

Decree signed.

/s/ RRH
SURROGATE

Dated: October 16, 1997

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June 1999

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 426
In the Matter of Abraham Warsaski, Deceased,
Respondent,

v.

Marshall Spiegel,
Appellant,
and Michael Spiegel,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Levine took no part.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Supreme Court, U.S.
F I L E D
NOV 8 1999

No. 99-422

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF
ABRAHAM WARSASKI, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Preliminary Statement	1
Statement of the Case	2
Reasons for Denying the Writ	4
I. Petitioner Failed To Raise Or Address The Issue Of A Federal Due Process Violation In The State Proceedings	4
II. The Trial Court Properly Exercised Its Discretion In Refusing To Admit Out Of State Counsel In Order To Avoid A Further Adjournment Of The Trial	7
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028 (1997) 4

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889 (1889) 4, 5

Statute:

28 U.S.C. § 1257 4

Other Authorities:

New York Civil Practice Law and Rule Section 4519 6

22 NYCRR § 520.11(b) 2

PRELIMINARY STATEMENT

Petitioner, Marshall Spiegal's ("Petitioner") motion for application for certiorari is a desperate attempt to concoct some constitutional argument and thereby obtain the jurisdiction of this Court. Petitioner's application should be denied in all respects.

Pointedly, petitioner *admits* that the constitutional provision cited as a basis for obtaining certiorari was never raised, at either the trial level, the intermediate appellate level or to the New York Court of Appeals (*see* petitioner's brief n.1). Hence, as fully detailed, *infra*, Petitioner's due process claims may not be raised for the first time on a petition for certiorari to this Court.

Moreover, it is abundantly clear from the Record that petitioner had more than ample opportunity to retain counsel of his own choosing. Indeed, the Trial Court's decision relieving petitioner's prior counsel, Richard Leng was dated May 29, 1997, four (4) months prior to the date the Trial Court scheduled for a trial. Petitioner intentionally omits the fact that in seeking admission *pro haec vice*, Mr. Meenan also sought an adjournment of the firm trial date. R 279[1]. In the Trial Court's correspondence denying the application, they specifically noted that the denial of the application was based, at least in part, upon adjournment of a firm trial date previously established by the Court. R 283.

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1. "R" references are to the Appellant Marshall Spiegal's Appendix submitted in connection with Spiegel's appeal from the Surrogate Court's Order and Decision to the Appellate Division of the Supreme Court, First Department.

Finally, the thrust of petitioner's argument, to wit: that the discretionary refusal by a state court judge denying a party's application for admission of an out-of-state attorney *pro haec vice* could ever result in a denial of due process is a reductio ad absurdum argument.

For all of the foregoing reasons, as well as those set forth below, it is respectfully submitted that the petition for certiorari be denied in all respects.

STATEMENT OF THE CASE

This case arises out of a proceeding before the Surrogate Court, New York County to admit the will of Abraham Warsaski to probate. Petitioner Marshall Spiegal, one of the sole surviving heirs of Warsaski objected to the admission of the will on the ground that Warsaski lacked testamentary capacity.

Throughout the pre-trial proceedings, Petitioner was represented by out-of-state counsel, Richard Leng, Esq. who was admitted *pro haec vice*. On or about May 22, 1997, Petitioner's counsel moved to be relieved as counsel, and this motion was granted by the Surrogate by order dated May 29, 1997. R 275-277, App. 4. In the order permitting Mr. Leng to withdraw, the Surrogate scheduled a firm trial date for September 5, 1997, and noted that, pursuant to 22 NYCRR § 520.11(b), Petitioner was required to retain New York local counsel if he wished to retain another out of state counsel. R 276.

Shortly thereafter, petitioner retained Joanne Rowland, a New York attorney as local counsel. Approximately one month following this Order, Petitioner sought to have a new

out-of-state counsel, Daniel C. Meenan, Jr. Esq., admitted *pro haec vice*, with the retention of local New York counsel, Joann Rowland, Esq. R 279. However, at the time Mr. Meenan moved for admission pro haec vice, he informed the court that he had a conflict with the September 5, 1997 firm trial date previously scheduled by the Surrogate and requested an adjournment to September 11, 1997. R 279.

By Order dated August 6, 1997 the Surrogate denied Mr. Meenan's request for an adjournment of the trial and his motion for admission *pro haec vice*. R 283, App. 2, pg.4. Specifically, the Trial Court observed that:

> This proceeding, however, has been pending for almost four years and objectant's former attorney conducted extensive pre-trial discovery. The matter was originally scheduled for trial in 1996, but was adjourned until March 1997, at which time it was again adjourned because of the actual engagement of proponent's counsel. Thereafter, objectant's former counsel sought leave to withdraw. By decision dated May 29, 1997, the attorney's application was granted and the proceeding was stayed so that objectants could retain new counsel. Such decision also notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997. Thus, *the record clearly establishes that objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of trial date. Objectant's are responsible for their failure to promptly retain new counsel and adequately prepare for trial* (*Emphasis Supplied*).

Thus, Petitioner had approximately one month to retain counsel of his choice to represent him at trial. At trial, Petitioner was represented by Joann Rowland, Esq.

Following a full jury trial, the Surrogate granted a directed verdict dismissing the remaining objection and admitting the Will for probate. App 3-6. Surrogate Roth's decision and order was unanimously affirmed by the Appellate Division of the Supreme Court, First Department. App. 1-2. Petitioner's application for leave to appeal to the Court of Appeals was denied. App. 7. As set forth above, at no time, either at the trial or the two (2) appellate levels, did Petitioner ever raise the constitutional argument which petitioner is seeking to interpose here.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO RAISE OR ADDRESS THE ISSUE OF A FEDERAL DUE PROCESS VIOLATION IN THE STATE PROCEEDINGS

As this Court has repeatedly held, "in reviewing state court judgments under 28 U.S.C. § 1257 . . . [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997). *See also Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894 (1889), which held that

> at a minimum, . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state

> courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

As this Court has held, "[p]rinciples of comity in our federal system require that he state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." 451 U.S. at 495, 101 S. Ct. at 1893. Moreover, as this Court has held,

> [t]here are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

In this case, Petitioner failed to raise a federal due process claim or argument in any of the state court proceedings below. Petitioner's appellate brief to the Supreme Court, Appellate Division, First Department, fails to assert any federal issue, much less specifically raising a federal due process claim. It merely lists as one of the questions presented, whether the Surrogate's Court properly denied the motion of Mr. Meenan for admission *pro haec vice*. In the section of the brief dealing with this issue, Petitioner merely argued that the denial "prevented him from receiving a fair trial." Petitioner cited one New York State case in support of his contention that the Surrogate "should have fashioned any number of reasonable pre-requisites to the admission of out-of-state counsel given the circumstances."

In Petitioner's motion for leave to appeal to the Court of Appeals, *Petitioner did not even raise this issue* in the list of questions presented for review. The *only* question presented by Petitioner was whether Section 4519 of the New York Civil Practice Law and Rules (New York State's "Dead Man's Statute") was properly relied upon to preclude Petitioner to authenticate certain writings allegedly authored by the decedent, Mr. Warsaski.

Accordingly, Petitioner failed to properly raise his federal due process claim below, and pursuant to the compelling considerations discussed above, this Court should decline to grant certiorari on that claim now.

II.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO ADMIT OUT OF STATE COUNSEL IN ORDER TO AVOID A FURTHER ADJOURNMENT OF THE TRIAL

Even if this Court did have jurisdiction over Petitioner's claim, certiorari should nonetheless be denied, because the petition is based solely upon an inaccurate representation of the Surrogate's reason for denying the motion of Petitioner's out-of-state counsel for admission *pro haec vice*. Contrary to Petitioner's assertion that the Surrogate "provided no coherent rationale" for denying Mr. Meenan's motion, the record clearly reflects that the motion was denied because Mr. Meenan informed the Surrogate that he would be unable to begin the trial on September 5, 1997, the firm trial date that had been scheduled by the Surrogate in May, 1997, and requested an adjournment of the trial. Thus, the Surrogate denied Mr. Meenan's application for admission due to the fact that he had a scheduling conflict with the firm trial date previously set, not due to an arbitrary whim. Indeed, this reason is noted in the Decision and Order of the Supreme Court, Appellate Division, First Department, dated February 23, 1999, annexed to the Petition at App. 2, which stated, "[Petitioner] was given sufficient notice by the Surrogate of the firm trial date to justify the Surrogate's denial of objectant's request for an adjournment by reason of his out-of-state attorney's scheduling conflict."

Petitioner was well aware of this firm trial date in May 1997, four months before the trial and almost one month before Mr. Meenan sought to be admitted. In light of Petitioner's prior knowledge that the trial date was firm, the

Surrogate was well within her discretion to refuse to adjourn the trial of this matter, which had been pending for four years, in order to accommodate the scheduling conflict of an out of state counsel. Thus, even if the Court were to consider Petitioner's due process claim, the record clearly proves that the Surrogate properly exercised her discretion in denying the motion for admission *pro haec vice* due to out-of-state counsel's inability to begin the trial as scheduled.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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(3)

No. 99-422

Supreme Court, U.S.
FILED
NOV 18 1999
CLERK

In The

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of New York

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE COURT HAS JURISDICTION TO REVIEW THIS CASE 1

II. THE SURROGATE COURT'S DENIAL OF THE MOTION FOR *PRO HAC VICE* ADMISSION WAS ARBITRARY AND VIOLATED DUE PROCESS 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Anti-Fascist Comm'n v. McGrath, 341 U.S. 123 (1941) 2

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) 5

Martinez v. California, 444 U.S. 277 (1980) 2

Powell v. Alabama, 287 U.S. 45 (1932) 5

Robinson v. Boeing Company, 79 F.3d 1053 (11th Cir. 1996) 2, 5, 7

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) 6

Taylor v. Kentucky, 436 U.S. 478 (1978) 1

ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THIS CASE

Respondent asserts that "the constitutional provision cited as a basis for obtaining certiorari was never raised, at either the trial level, the intermediate appellate level or to the New York Court of Appeal." Br. Opp. at 1. This is a mischaracterization. In his Petition for Certiorari, Spiegel highlighted the fact that "the principle of fundamental fairness that is the essence of due process was clearly in play" in the proceedings below. Pet. n.1. Although Spiegel did not explicitly cite the Fourteenth Amendment Due Process Clause previously, he did invoke the principle of fundamental fairness that is central to Fourteenth Amendment analysis when urging the New York Supreme Court that the Surrogate Court's denial of Meenan's motion for admission *pro hac vice* "prevented him from receiving a fair trial." Br. Opp. at 6.

The critical question thus becomes whether the reference to a denial of a fair trial put into play the constitutional question. It did. The Court's precedents on this issue lay out a variety of circumstances in which it can be said that a federal constitutional question is extant. Among these are cases reflecting the Court's position that, where the litigant has referred to the principle at issue without expressly referring to the constitutional provision, a properly raised federal question is present. For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978), the Court stated that an objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on

due process principles." Similarly, in *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980), the federal question was found to be extant where appellants failed to explicitly refer to a federal constitutional provision, but their response to a demurrer reflected they were relying on a "federally protected right to life."

This pragmatic approach is wholly appropriate given the axiom that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "represent[s] a profound attitude of fairness." *Anti-Fascist Comm'n v. McGrath*, 341 U.S. 123, 162-63 (1941) (Frankfurter, J., concurring). Moreover, this approach is especially warranted where, as here, the Surrogate Court's eleventh-hour denial of Meenan's motion preempted Spiegel's opportunity to "have his case fairly presented." *Robinson v. Boeing Company*, 79 F.3d 1053, 1056 (11th Cir. 1996). One month before the trial was to begin Spiegel had an "overriding need" for Meenan's representation. *See id.* That the Surrogate Court's denial of Meenan's motion implicated constitutional due process concerns in the most concrete way is evident when we consider the consequences of that action. Spiegel was left with no other option than to have an ill prepared lawyer try his case. Ms. Rowland's prior involvement in Spiegel's case had been limited to those few (virtually ministerial) acts performed merely as local counsel. She had less than one month to prepare for trial in a case that was so complex it had spent four years in discovery. Not surprisingly, the record reflects grave errors by Ms. Rowland which prejudiced Spiegel's right to a fair hearing.

II. THE SURROGATE COURT'S DENIAL OF THE MOTION FOR *PRO HAC VICE* ADMISSION WAS ARBITRARY AND VIOLATED DUE PROCESS

A. The Surrogate Court's Decision Was Arbitrary

Respondent defends the Surrogate's denial of Meenan's petition for *pro hac vice* admission as coherent. It states: "[T]he record clearly reflects that the motion was denied because Mr. Meenan informed the Surrogate that he would be unable to begin the trial September 5, 1997, the firm trial date that had been scheduled by the Surrogate in May 1997. . . . " Br. Opp. at 7. There are multiple problems with Respondent's argument.

First, the rationale Respondent analyzes is actually that of the New York Supreme Court, not the Surrogate. The Surrogate Court did not refer to Mr. Meenan's inability to begin trial on September 5, 1997, and we have no reason to think that this was a factor in the Surrogate's decision. The trial court's response to Meenan's motion consisted only of the statement that "objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." App. 4. As explained at pages 6-7 of the Petition for Certiorari and reiterated below, this rationale simply is not logical. In this context, the New York Supreme Court's explanation of why the Surrogate Court denied Meenan's motion is relevant only insofar as it functions to highlight the arbitrariness of the Surrogate Court's decision.

Second, the Surrogate Court's rationale for denying Meenan's motion is arbitrary because it bears no relation to the circumstances surrounding Meenan's acts as Spiegel's counsel. The trial court supported its denial of Meenan's motion by stating: "[O]bjectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." App. 4. The court's rationale is nonsensical because it refers to facts not present in this case. All parties had proceeded on the understanding that the Surrogate Court had no objection to Meenan trying Spiegel's case. This assumption was reasonable because: *(1)* The court indicated the motion for *pro hac vice* status would be granted if an association were arranged with a New York attorney who would serve as counsel of record; and *(2)* the Surrogate Court expressed no objection to Meenan's involvement in the case during the three months he was diligently preparing for trial. It was only *after* Meenan had engaged in extensive preparation and *after* Meenan sought to confirm the trial court's approval of his *pro hac vice* status that the court abruptly and unexpectedly denied his motion.

The Surrogate Court's rationale fails because Meenan *was* adequately prepared for trial, and Spiegel reasonably believed he *had* retained new counsel. The unfairness in this case resulted from the Surrogate Court's denial of Meenan's motion and not from Spiegel's lack of diligence in preparing his case.

Moreover, the very suggestion that Spiegel failed to ensure his case would be effectively presented is illogical. Obviously, it would have been irrational for Spiegel to

incur the cost of Meenan's representation and jeopardize the success of his case if he had any reason to believe Meenan would be denied *pro hac vice* admission.

Third, the timing of the Surrogate Court's decision contributes to its arbitrariness. If the court had denied the motion in a timely manner, Spiegel may have been able to retain other counsel who would still have had adequate time to prepare the case for trial. *See infra.* Although Spiegel's constitutional right to qualified counsel of choice may nonetheless have been violated, the prejudice would not have been as egregious if Spiegel at least had been able to retain counsel who could have presented his case effectively.

B. The Surrogate Court's Arbitrary Denial of the Motion Violates Due Process

1. Due Process is implicated in this case because there is a qualified right to counsel of choice in a civil proceeding.

Respondent characterizes the Petition for Certiorari as a "desperate attempt to concoct some constitutional argument and thereby obtain the jurisdiction of this Court." Br. Opp. at 1. We are at a loss to understand this claim. As discussed in detail in both the Petition for Certiorari and the *amicus curiae* brief urging this Court's review, a qualified right to counsel of choice in a civil proceeding flows directly from this Court's decision in *Powell v. Alabama*, 287 U.S. 45, 69 (1932) and its progeny, and the decisions of other courts. *See Robinson*, 79 F.3d at 1056; *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir.

1975); *Sanders v. Russell*, 401 F.2d 241, 245-46 (5th Cir. 1968).

The import of these decisions is that a state court's discretion in granting or denying *pro hac vice* motions must be tempered by the civil litigant's qualified due process right to counsel of choice. Although courts do have a legitimate interest in ensuring their proceedings are conducted in a fair and timely fashion by qualified counsel, they are *not* free to *arbitrarily* override a motion to appear *pro hac vice*. Thus, Respondent's argument that the Surrogate Court's denial of Meenan's motion for *pro hac vice* admission does not implicate due process is not availing.

2. Respondent's conclusion that the Surrogate Court's denial of the motion to appear *pro hac vice* is valid fails because Respondent ignores Petitioner's qualified due process right to counsel of choice.

The analysis of Respondent in its Brief in Opposition suffers from the same defect as the decisions of the Surrogate Court and the New York Supreme Court. Implicit in each is the premise that because the decision whether to grant *pro hac vice* status rests with courts and is discretionary, a court is free to summarily reject such a motion without considering the adverse consequences on the litigant. Such an approach fails to balance the trial court's interest in ensuring the proper administration of justice with a litigant's qualified right to counsel of choice. Here,

the Surrogate Court should have recognized that the timing of the denial of Meenan's motion could have foreclosed Spiegel's opportunity to have his case effectively presented. Meenan had prepared extensively for the trial. Ms. Rowland was retained by Spiegel solely for the purpose of advising Meenan on points of local procedure. She could not have been expected to adequately present Spiegel's case and the Surrogate should have realized this.

As the *Robinson* Court found, in a case where a litigant's "ability to have its case fairly presented" would be undermined by a court's denial of a motion to add counsel, due process is implicated and the court's interest in time and delay must yield to the litigant's right. *See Robinson*, 79 F.3d at 1055-56. While a court has discretion in ruling on motions for *pro hac vice* admission, that discretion does not translate into a license to deny litigants their federal constitutional right to due process. Thus, a court cannot *arbitrarily* deny a motion for counsel, as did the Surrogate Court in this case, where that decision operates to deny a litigant the representation he needs and is constitutionally entitled to.

To permit the lower court's decision to stand would threaten the continued vitality of the qualified right to select counsel of one's choice in a civil proceeding. A right that can be overridden by a decision as arbitrary as the one in this case effectively has no meaning.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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(4)

No. 99-422

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF
ABRAHAM WARSASKI, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Table of Appendices	iii
Preliminary Statement	1
Further Reasons for Denying the Writ	3
I. Petitioner Failed To Raise Or Address The Issue Of Federal Due Process Violation In The State Court Proceedings.	3
II. The Trial Court's Denial Of Out-Of-State Counsel's Application For Admission *Pro Hac Vice*, Which Was Coupled With His Request For An Adjournment Of A Firm Trial Date, Was A Valid Exercise Of Discretion.	3
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

Powell v. Alabama, 287 U.S. 45 (1932) 1

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) .. 1

United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987) 1

Rules:

United States Supreme Court Rule 15.8 1

United States Supreme Court Rule 37.6 3

TABLE OF APPENDICES

Page

Appendix A — Letter Of The Surrogate's Court Of The County Of New York Denying Motion To Admit Out Of State Counsel And Request For Adjournment Of Trial Dated August 6, 1997 ... 1a

Appendix B — Excerpt From Trial Transcript Of The Surrogate's Court Of The City Of New York, New York County Dated September 5, 1997 ... 3a

PRELIMINARY STATEMENT

This supplemental brief is being submitted in opposition to the brief of Amici denominated in the brief as "concerned Illinois lawyers and law professors" ("Amici") in accordance with Rule 15.8 of the Rules of the Supreme Court of the United States. In a desperate effort to find a Constitutional basis for Petitioner, Marshall Spiegel's ("Petitioner") claim, the Amici contort legal principals and intentionally misstate relevant facts. In addition, Amici make statements which are not to be found anywhere in the record.

As will be more fully detailed below, neither *Powell v. Alabama*, 287 U.S. 45 (1932) nor any of the other cases decided by this Court have any applicability to this situation, where a trial court exercised its discretion in denying Petitioner's application for a *pro hac vice* admission of an out-of-state attorney based upon such attorney's insistence upon an adjournment of a previously scheduled firm trial date. Both *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); and *United States v. Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987) invalidated state statutes limiting *pro hac vice* appearances to one per attorney per annum. No such prohibition is at issue in this case.

Further, by intentionally misstating facts, the Amici give the impression that the denial of Petitioner's application for *pro hac vice* admission of Mr. Meenan was determined at the eleventh (11th) hour. As will be detailed below, nothing could be further from the truth. Indeed, Amici omit a copy of the August 6, 1997 Decision and Order of the Surrogate denying Mr. Meenan's admission, an Order which was issued a month prior to the trial date. This Order stated quite

explicitly that the application for *pro hac vice* admission was being denied, inasmuch as Mr. Meenan had sought an adjournment of the firm trial date (*see* Resp. Supp. App. 1a-2a annexed hereto).[1]

Significantly, Amici concede, as they must, that Petitioner never raised a Constitutional argument either at the Surrogate Court level, Intermediate Appellate level or to the New York Court of Appeals. Instead, it is raised for the first time on this application for certiorari. Further, it is *undisputed* that Petitioner never perfected an appeal from the interlocutory order of the Surrogate with respect to the denial of Mr. Meenan's admission, as was his right under applicable New York State procedural law. It is equally *undisputed* that Petitioner did not seek a stay of the trial, from either the Surrogate Court or upon application to the Appellate Division of the Supreme Court, staying the trial pending a determination of the issue of Mr. Meenan's admission. Hence, for all of the foregoing reasons, as well as those set forth below and in the respondent's brief in opposition to the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari be denied in all respects.

---

1. References to "Resp. Supp. App." refers to the Respondent's Supplemental Appendix annexed hereto.

FURTHER REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO RAISE OR ADDRESS THE ISSUE OF FEDERAL DUE PROCESS VIOLATION IN THE STATE COURT PROCEEDINGS.

This issue is adequately addressed in Respondent's Brief in Opposition and for the reasons set forth therein it is respectfully submitted there is no basis for this Court to exercise its jurisdiction. Moreover, the Amici fails even to address this fatal flaw in Petitioner's application.

II.

THE TRIAL COURT'S DENIAL OF OUT-OF-STATE COUNSEL'S APPLICATION FOR ADMISSION *PRO HAC VICE*, WHICH WAS COUPLED WITH HIS REQUEST FOR AN ADJOURNMENT OF A FIRM TRIAL DATE, WAS A VALID EXERCISE OF DISCRETION.

The thrust of the Amici's argument is that by denying Petitioner's application for the *pro hac vice* admission of Mr. Meenan, the Court deprived him of due process. This argument is without merit.[2] The Amici further intentionally

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2. It is interesting to note that while professor Thomas indicates that the Amici, to wit: "Concerned Illinois Lawyers and Law Professors" is [sic] a "diverse group of lawyers and law professors who practice and teach in Chicago" no such list is attached to the Amicus brief. This is particularly interesting since Professor Thomas further states; pursuant to Supreme Court Rule 37.6 that "he has authored

(Cont'd)

misstate other material facts. For instance, the Amici speciously claim, on Page 12 of their brief, that the Appellate Division listed a different reason for denying Mr. Meenan's application his request for a four-day adjournment. As noted in the Resp. Supp. App. 3a, in denying Mr. Meenan's application, the Surrogate Court stated:

> The motion to admit out of state counsel *and request for an adjournment of the upcoming trial in order to accommodate his schedule is denied.* Counsel shall proceed with jury selection on September 5, 1997 at 10:00 a.m. and the trial on September 8, 1997. (emphasis supplied).

Thus, the Appellate Division was simply affirming the discretionary decision of the Surrogate's Court. In this regard, it is important to keep in mind the fact that the matter had been pending close to four (4) years. Moreover, the chronology of events is not as Amici seek to portray it. On May 29, 1997, the Surrogate granted the application of Richard Leng to be relieved as counsel. On June 20, 1997, Mr. Meenan, through the retained local counsel, Joanne Rowland sought leave for admission *pro hac vice*. On August 6, 1997, the Surrogate denied Mr. Meenan's application based on his application for yet another adjournment for the trial.

(Cont'd)

this brief in whole, and that no person or entity has made a monetary contribution to the preparation and submission of the brief". Previously, during the course certain colloquy between counsel at the trial of this proceeding, Professor Thomas was mentioned as having given expert advice to the Petitioner during the course of trial. One can only wonder as to whether Professor Thomas was paid by Petitioner for these services or, alternatively, they were provided *pro bono* (*see* Resp. Supp. App. 3a).

It is *undisputed* that no appeals or other actions were taken by Petitioner between August 6 and September 5, 1997 with respect to the order denying the Petitioner's application to admit Mr. Meenan *pro hac vice*. Pursuant to applicable New York State procedural law, Petitioner could have sought a stay from either the Surrogate or the Appellate Division staying the trial pending the determination of an appeal (which Petitioner never sought) from the interlocutory order denying Mr. Meenan's admission. He did not. Nor, for that matter, was the issue of the denial of Petitioner's application to admit Mr. Meenan raised during the series of motions which Petitioner made at the commencement of the trial on September 5, 1997. Parenthetically, the Court will note that during this colloquy Professor Thomas' name was raised as an individual who had counseled Petitioner with respect to the trial. (*See* Resp. Supp. App. 3a).

Further, Petitioner's specious argument that he had "an overriding need for Mr. Meenan's representation" is patently absurd. The sole issue before the Surrogate's Court was whether the decedent was suffering from insane delusions which affected his testamentary capacity to make a will. The determination of this issue was governed solely by applicable New York Law.

Amici's further argument that Ms. Rowland "lacked fundamental trial experience" is not raised anywhere in the proceedings below at any level.[3] Respondent did not select Ms. Rowland. Petitioner, apparently in consultation with Mr.

---

3. Respondent is unaware of any case law supporting the claim that "ineffective assistance of counsel" is a valid Constitutional argument with respect to a civil litigant. Even if it were, it is not raised by either Petitioner or Amici at any of the lower court proceedings or even on application to this Court.

Meenan, selected her. If, as claimed in conclusory fashion by Amici, she lacked the appropriate knowledge of New York's Deadman's Statute, then this is not a matter sufficient to justify the invocation this Court's Constitutional jurisdiction. All of the statements set forth at Pages 13 through 15 of Amici brief are dehors the record. Moreover, Amici has the temerity to insert matters concerning possible settlement negotiations into this brief. Respondent will not comment extensively on this issue other then to deny what Amici state, that they have no personal knowledge of any alleged settlement offer and that settlement negotiations are, in any event, supposed to be kept confidential between counsel and the litigants and not raised in any judicial proceedings.

CONCLUSION

Neither Petitioner, nor Amici raise any legitimate argument warranting the invocation of this Court's jurisdiction. There was no denial of due process rights by the Surrogate's discretionary determination, a month prior to trial, denying Mr. Meenan's application for *pro hac vice* admission. In any event, the Constitutional argument was not raised at either the trial or any intermediate Appellate levels and was not properly preserved for this Court's review.

Further, Petitioner made no attempt to secure judicial review of the Surrogate Court's August 6, 1997 ruling, nor did Petitioner seek a stay of the trial pending a determination of the issue of Mr. Meenan's application. Appellate review could have been sought on this interlocutory ruling, but was not. Amici's further arguments with regard to Ms. Rowland's representation are irrelevant, have no support in the record and are purely red herrings which represent a last ditch effort to seek this Court's sympathy, where none is deserved.

For the foregoing reasons, as well as those set forth in respondent's opposition brief, it is respectfully submitted that the application for a writ of certiorari be denied in all respects.

Respectfully submitted,

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APPENDIX

APPENDIX A — LETTER OF THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK DENYING MOTION TO ADMIT OUT OF STATE COUNSEL AND REQUEST FOR ADJOURNMENT OF TRIAL DATED AUGUST 6, 1997

SURROGATE'S COURT
OF THE
COUNTY OF NEW YORK

* * *

August 6, 1997

Joanne Rowland, Esq.
321 Broadway, 3rd Floor
New York, NY 10007

Steven E. Rosenfeld, Esq.
Stein, Garr & Rosenfeld
805 Third Avenue
New York, NY 10022

Re: *Estate of Abraham Warsaski — File No. 4323/93*

Dear Counsel:

The motion to admit out of state counsel and request for an adjournment of the upcoming trial in order to accommodate his schedule are denied. Counsel shall proceed with jury selection on September 5, 1997 at 10:00 a.m. and the trial on September 8, 1997.

Very truly yours,

s/ Colleen Carew
Colleen F. Carew
Principal Law Clerk to
Surrogate Renee R. Roth

APPENDIX B — EXCERPT FROM TRIAL TRANSCRIPT OF THE SURROGATE'S COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY DATED SEPTEMBER 5, 1997

SURROGATES COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY

Index No. 4323/93

HOWARD LEDER, as Preliminary Executor of the Estate of ABRAHAM WARSASKI,

Proponent,

– against –

MARSHALL SPIEGEL & MICHAEL SPIEGEL,

Objectants.

31 Chambers Street
New York, New York 10007
September 5, 1997

BEFORE:

HONORABLE RENEE ROTH,
Justice

* * *

MS. ROWLAND: The final motion is somewhat novel, also about the jury. I have been advised by professor Thomas, law professor at Chicago ITT Kent that the Batson rule has been expanded by two recent Supreme Court cases.

* * * *

MOTION FILED

NOV 8 1999

(6)

No. 99-422

In The
Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York

BRIEF OF AMICUS CURIAE

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Dated: November 8, 1999

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BEFORE THE COURT'S CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI

NOW COME *Amici* in support of Petitioner, MARSHALL SPIEGEL, by their attorney, DAVID C. THOMAS, pursuant to United States Supreme Court Rule 37, and move this Honorable Court for leave to file an Amicus Curiae Brief in support of the Petitioner's Petitioner for Writ of Certiorari and in support state:

1. Respondent, PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED, through its attorney, Steven Rosenfeld, has not provided its consent to the submission of this *Amicus Curiae* brief in support of the Petitioner's position. However, Petitioner has provided his consent.

2. Petitioner initiated a suit in the Surrogate Court of New York County against Respondent. His attorney, Mr. Meenan, filed an application for a *pro hac vice* appearance about three months prior to trial.

3. The Surrogate Court indicated that it would grant such an application subject to the association of New York counsel. Petitioner quickly complied with the requirement.

4. Mr. Meenan diligently prepared for trial. He is an experienced trial attorney with knowledge in the relevant area of law. He also made it known to the court two and one half months prior to trial that he could not be available on the trial date set by the court, but would be available four court days later.

5. Less than one month prior to trial, and only after Petitioner's counsel inquired, the Surrogate Court denied the

application arbitrarily. The court merely stated that Petitioner had plenty of time to secure counsel and prepare for trial—which Petitioner had done.

6. As a result, Petitioner was required to rely on inexperienced and incompetent counsel, thereby losing his opportunity for a fair trial.

7. Only at the appellate level, was Petitioner advised that the denial was related to Mr. Meenan's request for a four-day adjournment.

8. Relying on *Powell v. Alabama*, 287 U.S. 45 (1932), *Amici* argue that a litigant in a civil proceeding has a qualified Fourteenth Amendment Due Process right to counsel of choice. Such a right cannot be defeated arbitrarily, nor even in the face of the court's interest in time and delay where there exists an overriding need for a particular lawyer.

9. Petitioner's qualified Due Process right to counsel of choice was violated by the Surrogate Court's arbitrary denial of the application for a *pro hac vice* appearance. Additionally, Petitioner had an overriding need for Mr. Meenan's representation.

10. *Amici* are 20 individuals, attorneys and law professors, committed to the principles of the Fourteenth Amendment and concerned with the rights of all parties to select counsel of choice.

11. *Amici* are especially concerned that should the Surrogate Court's decision be upheld, it would severely diminish the ability of many parties to select counsel of their choice and would have a negative impact on the ability of lawyer to represent clients in important cases in other states.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a party to a civil proceeding has a qualified right to counsel of choice?

2. Whether this right is violated when a court arbitrarily denies an application for an appearance *pro hac vice* less than a month before the scheduled date of a trial, where the court had previously indicated that the application for the appearance would be accepted provided the out-of-state attorney obtained local counsel to assist?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE.....1

INTRODUCTION AND SUMMARY.....3

ARGUMENT.....6

I. A Litigant in a Civil Proceeding Has a QualifiedDue Process Right to Counsel of Choice That Cannot Be Overridden Arbitrarily.....6

II. Petitioner's Qualified Due Process Right to Counsel Of Choice Was Violated When the Surrogate Court of New York Denied Mr. Meenan's Application for a *Pro Hac Vice* Appearance.....11

A. The Surrogate Court's Denial of Mr. Meenan's Application Was Arbitrary.....12

B. The Surrogate Court's Denial of Mr. Meenan's Application Failed to Consider Petitioner's Overriding Need for Mr. Meenan's Representation.....13

C. The Untimeliness of the Surrogate Court's Denial Further Operated to Impede Petitioner's Exercise

of His Qualified Due Process Right to Counsel of Choice.....15

CONCLUSION.....16

TABLE OF AUTHORITIES

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985).....4

Powell v. Alabama, 287 U.S. 45 (1932).....6,9

Robinson v. Boeing Co., 79 F.3d 1053 (11th Cir. 1996) 7, 8, 13, 15

United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987).....9, 10, 12

Hull v. Celanese Corp., 513 F.3d 568 (2d Cir. 1975).....7, 8

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968).....9, 10

STATEMENT OF INTEREST OF THE AMICI

This *amicus* brief is filed on behalf of 20 individuals, collectively identified as "Concerned Illinois Lawyers and Law Professors," pursuant to Rule 37.2 of this Court.[1] The individual *amici* are a diverse group of lawyers and law professors who practice and teach in Chicago, and are committed to the principles of the Fourteenth Amendment and to the fair and effective administration of justice.

The *amici* have quite divergent positions on a wide range of issues relating to the justice system. However, they share one common view, which prompts their involvement in this brief: the *amici* believe that the New York Surrogate Court's decision in this matter failed to give appropriate consideration to the fundamental right of a party to a civil proceeding to choose his or her own attorney. *Amici* are concerned not simply about the Fourteenth Amendment issue presented in the *Spiegel* case, but more fundamentally about the rights of all parties to select counsel of their choice. *Amici*, a number of whom are lawyers with clients whose litigation is not always conducted in the state in which the lawyers are licensed, are concerned that the New York Surrogate Court's decision in this case, if upheld, would severely diminish the ability of many parties to select counsel of their choice and, correspondingly, would also have a negative impact on the ability of lawyers to represent clients in important cases in other states.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae*, David Thomas, states that he has authored this brief in whole, and that no person or entity has made a monetary contribution to the preparation and submission of the brief.

Amici believe that their perspective will complement that of the Petitioner and will provide assistance to this Court in deciding the issues.[2]

2 Respondent has not provided its consent to the submission of this brief. Petitioner has provided his consent.

INTRODUCTION AND SUMMARY

Petitioner, Marshall Spiegel, initiated this suit in Surrogate Court, New York County, objecting to the admission of the will of Abraham Warsaski to probate on the ground that Mr. Warsaski lacked testamentary capacity. In May 1997, over Petitioner's objections, the court permitted Petitioner's attorney at the time, Mr. Richard Leng, appearing *pro hac vice,* to withdraw from the case. The court indicated that a substitute attorney would be given leave to appear as long as an association was made with a New York attorney who would serve as counsel of record, emphasizing the state's rule that an association with a New York attorney is required.[3] A trial date was set for September 5, 1997.

To replace Mr. Leng, Petitioner retained Daniel Meenan, an Illinois lawyer, who immediately began to prepare for trial and submitted a request for admission *pro hac vice.* He also arranged for the co-appearance of a New York licensed attorney, Ms. Joann Rowland. On June 20, 1997, Mr. Meenan and Ms. Rowland informed the court that Mr. Meenan would not be able to proceed until September 11 due to a prior trial commitment on September 8th and 9th, causing a delay of only four days.[4]

Several weeks before trial, the New York attorney checked with the Surrogate Court to ensure that Mr. Meenan

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3 The validity of this rule is not involved in this case.

4 September 5 fell on a Friday in 1997. Thus, although September 11 was six days later, court was only in session for four of those five days.

would be allowed to appear on Petitioner's behalf. Only at that time, less than a month before trial, did the court inform Petitioner that Mr. Meenan would not be admitted *pro hac vice*.

The court proceeded with the trial over Petitioner's objections that Ms. Rowland's role was to be ministerial and that she was to advise on New York law and procedure. She had been retained solely as local counsel, not as trial counsel. The court eventually admitted the will of Mr. Warsaski over Petitioner's objections. In response to Petitioner's argument that the decision to bar Mr. Meenan's appearance had resulted in prejudicial unfairness, the court simply responded that Petitioner was sufficiently notified of the trial date and that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." (Appendix to Petitioner's Petitioner for Writ of Certiorari [hereinafter Pet.'s App.] at 4.) The court's reasoning made no sense considering that Petitioner had immediately retained counsel, Mr. Meenan, even before Mr. Leng's motion for withdrawal was granted, and Mr. Meenan immediately began preparing for trial and would have been adequately prepared for trial but for the court's ruling.

Upon appeal to the New York Supreme Court, Appellate Division, from the Surrogate Court's refusal to admit Mr. Meenan *pro hac vice* and lack of timely notice to Petitioner, among other issues, the court rejected Petitioner's arguments. The Supreme Court advanced a new reason to

justify the decision of the trial court. The Supreme Court stated that Petitioner was given sufficient notice of the trial date to "justify denial of [Mr. Spiegel's] request for an adjournment by reason of his out-of-State attorney's scheduling conflict." (Pet.'s App. at 2.) The New York Court of Appeals denied Petitioner's motion for leave to appeal.

ARGUMENT

Amici submit this brief to address two essential concerns relevant to the Fourteenth Amendment and the fair and proper administration of justice.

In Part I, we discuss the law relating to the qualified Fourteenth Amendment Due Process right of a litigant in a civil trial to counsel of choice. We also discuss the need to balance this right against the court's obligation to promote the fair and proper administration of justice.

In Part II, we demonstrate that the Surrogate Court of New York County violated the qualified Due Process right to counsel of choice.

I.

A Litigant In a Civil Proceeding Has a Qualified Due Process Right to Counsel of Choice That Cannot Be Overridden Arbitrarily.

As long ago as *Powell v. Alabama*, this Court has recognized a qualified Fourteenth Amendment Due Process right to retained counsel of choice in a civil proceeding. 287 U.S. 45, 69 (1932). This Court stated that

> [i]f in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. (emphasis added). It described this right as fundamental in nature. *Id.* at 63, 70. In addition, this Court stated that

"[i]t is hardly necessary to say that the right to counsel being conceded, a [party] should be afforded a fair opportunity to secure counsel of his own choice." *Id.* at 53. However, beyond *Powell*, this Court has not provided guidance regarding the extent of a party's right to counsel of choice in a civil proceeding. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (resolving case on jurisdictional grounds, in which the revocation of counsel's *pro hac vice* appearance was at issue, without reaching the merits of the revocation issue).

Although the right to counsel of choice for a civil litigant is not absolute, a number of courts have recognized its existence. However, without the guidance of this Court, lower courts have approached the issue in a variety of ways. Notably, the one common theory in these cases is that this qualified right may not be overridden arbitrarily. *See e.g., Robinson v. Boeing Co.*, 79 F.3d 1053, 1056 (11th Cir. 1996) (finding that the existence of a right to counsel of choice is subject to considerations of time delay and loss of prior judicial activity, unless there is an "overriding need for a particular lawyer"); *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir. 1975) (stating that "an individual's right to be represented by counsel of his or her choice" must be weighed against "the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice").

The Eleventh Circuit recognized the right to counsel of choice in *Robinson v. Boeing Company*, subject to

considerations of time and delay. 79 F.3d at 1055. In *Robinson*, in order to grant the defendant's motion to add counsel to his defense team, the trial court would have had to reassign the case to another judge. In upholding the trial court's denial of the motion, the Eleventh Circuit noted that the change of judges was a sufficient reason, "in the absence of an *overriding need for a particular lawyer.*" *Id.* at 1056 (emphasis added) (internal quotations omitted). The court defined overriding need as "a need that would reflect upon the litigant's ability to have its case fairly presented, rising to constitutional due process concerns." *Id.* Such a need "would trump both time delay and the loss of prior judicial activity." *Id.*

Similarly, in *Hull v. Celanese Corporation*, the Second Circuit recognized a civil litigant's right to counsel of choice, subject to certain considerations of judicial integrity. 513 F.2d at 568, 572. In *Hull*, an attorney for the defendant corporation sought to intervene as a plaintiff in the same action. The attorney had participated in the defense of this case for several months before seeking to intervene as a party. The law firm she retained to represent her was the same law firm that represented the original plaintiff in the suit. The court was concerned that the attorney had or would subconsciously or consciously communicate, to the law firm representing her, privileged information that she had learned during her participation in the defense of the corporation.

The court upheld disqualification of the law firm representing the attorney. However, in doing so, the court stated that "[r]ecognizably important [is the party]'s right to counsel of her choice," but this consideration "must yield . . . to considerations of ethics which run to the very integrity of our judicial process." *Id.* at 572.

Courts faced with the issue of arbitrary restrictions to *pro hac vice* appearances have held that these restrictions are impermissible, explicitly and impliedly referring to the qualified Due Process right to counsel of choice. For example, in *Sanders v. Russell*, the Fifth Circuit held that Mississippi's arbitrary restriction of one *pro hac vice* appearance per attorney per year impermissibly interfered with a civil litigant's right to counsel of choice. 401 F.2d 241, 245-46 (5th Cir. 1968). In reaching its conclusion, the court stated that "[i]t is difficult to see how the concern of the District court in decorum, dignity, competency, good character or amenability to service and discipline is served by a numerical limitation." *Id.*

In *United States v. Panzardi Alvarez*, a criminal case, the court found that Puerto Rico's statute limiting an attorney's *pro hac vice* appearances to one per year inappropriately interfered with the defendant's right to counsel of choice. 816 F.2d 813, 817 (1st Cir. 1987). Although the right involved to was the Sixth Amendment right to counsel, the opinion was based on this Court's decision in *Powell* recognizing a qualified right to counsel in

both civil and criminal cases under the Due Process Clause. The court in *Panzardi Alvarez* noted that this right must give way only if it interferes with the "fair, efficient and orderly administration of justice." *Id.* at 816. For example, in an "eleventh hour" application for a *pro hac vice* appearance, the defendant must show good cause. But the appearance for the defendant in that case had been filed three months prior to the trial, indicating no interference with the fair and orderly administration of the case.[5] The First Circuit could not discern how Puerto Rico's limitation on the number of *pro hac vice* appearances per year per attorney could advance "the district court's legitimate interest in regulating the conduct of its attorneys." *Id.* at 817.

These cases make clear the existence of a qualified Due Process right to counsel of choice in a civil trial. Since this right is not absolute, it must be balanced with the court's obligation to promote the proper administration of justice. Thus, the right is subject to legitimate considerations of judicial efficiency and integrity. However, this right is not subject to arbitrary whims of the courts. Certainly, this Court would not have recognized such a right in *Powell* if the right could so easily and arbitrarily be defeated. Even considerations such as those of time and delay must give way in the presence of an overriding need for a particular lawyer.

5In the case at bar, the request for Mr. Meenan's appearance was also filed three months prior to the trial date.

II.

Petitioner's Qualified Due Process Right to Counsel of Choice Was Violated When the Surrogate Court of New York Denied Mr. Meenan's Application for a *Pro Hac Vice* Appearance.

In denying Mr. Meenan's application for a *pro hac vice* appearance, the Surrogate Court of New York did not even consider Petitioner's qualified right to counsel of choice. When Petitioner immediately filed his objections that, because of the court's arbitrary and untimely denial of Mr. Meenan's application, Petitioner had no choice but to be represented by counsel who was initially retained for the limited purpose of advising on New York law and procedure, the court's only response was that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." (Pet.'s App. at 4.) The court did not even acknowledge its role in impeding the proper representation of Petitioner's case by the court's untimely denial of the application. Moreover, Petitioner had promptly retained new counsel in Mr. Meenan who was prepared for trial. Thus, the denial of Mr. Meenan's application was arbitrary in violation of Petitioner's qualified Due Process right to counsel of choice. Moreover, even had the Surrogate Court claimed any interest in commencing the trial on September 5 versus on September 11, this interest was substantially outweighed by Petitioner's overriding need for Mr. Meenan's representation. The error is further aggravated by the trial court's grossly untimely delay in issuing its decision to deny the application, which further impeded Petitioner's exercise of his qualified right to counsel of choice.

A.

The Surrogate Court's Denial of Mr. Meenan's Application Was Arbitrary.

In its decision to deny Mr. Meenan's application for a *pro hac vice* appearance, the trial court stated only that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." (Pet.'s App. at 4.) Petitioner had complied with both of these responsibilities. As soon as he realized that Mr. Leng would withdraw his representation, Petitioner immediately retained Mr. Meenan to represent him in this mater. Mr. Meenan then immediately began preparing for trial and would have been prepared had the court abided by its representation that it would allow Mr. Meenan's application to appear *pro hac vice* upon retention of local counsel. Thus, the court's reason did not apply to Petitioner's case. And since the court advanced no other legitimate reasons for denying the application—such as time, delay, ethics or judicial integrity—the court's decision was precisely the kind of arbitrary restriction on *pro hac vice* appearances that the First and Fifth Circuits have held impermissible. *See Panzardi Alvarez*, 816 F.2d at 817; *Sanders*, 401 F.2d at 245-46.

Upon review, the New York Supreme Court Appellate Division listed a different reason for denying Mr. Meenan's application—his request for a four-day adjournment. This reasoning also failed to articulate a legitimate reason. First, the trial court never stated in its opinion that the reason for the denial was the request for a four-day delay. The New York Supreme Court Appellate Division likely noticed that the trial court's stated reason for denying the application did not apply to Petitioner's case and was arbitrary. Then, in an attempt to correct the mistake, the

New York Supreme Court Appellate Division read into the trial court's opinion reasoning that was clearly not there. Second, a four-day delay hardly justifies denying a party's qualified right to counsel of choice, especially where, as discussed below, there is an overriding need to be represented by a particular lawyer. Had the four-day delay truly been the trial court's concern, the court should have granted the application for the appearance, then *immediately* cautioned Petitioner, upon learning of the potential delay, that the court would not move the trial back four days.

B.

The Surrogate Court's Denial of Mr. Meenan's Application Failed to Consider Petitioner's Overriding Need for Mr. Meenan's Representation.

Petitioner had an overriding need for Mr. Meenan's representation that outweighed any trial court interest in time or delay. *See Robinson*, 79 F.3d at 1056 (right to counsel of choice is subject to considerations of time and delay unless there is an "overriding need for a particular lawyer"). Petitioner retained Mr. Meenan to represent him in the matter in June, 1997, relying on the Surrogate Court's representation that it would accept Mr. Meenan's *pro hac vice* application as long as he local counsel was also retained. The Court's order did not indicate that it was subject to any other restrictions.

Based on the Court's representation, Mr. Meenan spent the next two months preparing for trial. Ms. Rowland, the New York attorney retained, did not prepare for trial as she was only retained as local counsel. Thus, when Ms. Rowland contacted the Surrogate Court to ensure that all was well with Mr. Meenan's application, everyone was surprised to learn that the Surrogate Court was going to deny the

application. Prior to August 6, 1997, the Surrogate Court had not provided any indication that it would deny the application; in fact, in its order dated May 29, 1997, the trial court represented the exact opposite, provided that local counsel was retained. (Reprinted in Appendix to this Brief at 1.)

Because of the court's order, Mr. Meenan had conducted extensive preparation for the trial, and Ms. Rowland had not. Her lack of knowledge and experience in the area foreclosed Petitioner's opportunity to a fair trial.

Before the trial, Petitioner was offered $108,000 as a settlement by the Respondent. Ms. Rowland advised the Petitioner to reject the offer. She indicated to Petitioner that certain key evidence in the case would undoubtedly be admitted, implying that Petitioner had a good chance to succeed at trial. However, Ms. Rowland was not properly versed in New York law, and specifically in the New York Dead Man's Statute, despite knowing well ahead of time that certain testimony required for Petitioner's case might raise issues under the Dead Man's Statute. She had represented to Petitioner that she had done all the necessary research in the area. She was wrong on all this advice she gave to Petitioner.

In addition, at the commencement of the trial, it became evident that Ms. Rowland lacked fundamental trial experience. She had also been wrong on all the advice she had given Petitioner. The expert testimony on which Petitioner's case relied was not admitted. Moreover, Ms. Rowland failed to raise evidentiary objections, thereby waiving them for appeal.

After less than one day of trial, Petitioner was not allowed to present any evidence in support of his position. The court consequently directed a verdict against Petitioner. Thus, Petitioner's "ability to have [his] case fairly presented"

was inappropriately hindered by the trial court's decision to reject Mr. Meenan's application, forcing Petitioner to rely on Ms. Rowland's incompetent representation, "rising to constitutional due process concerns." *Robinson*, 79 F.3d at 1056.

C.
The Untimeliness of the Surrogate Court's Denial Further Operated to Impede Petitioner's Exercise of His Qualified Due Process Right to Counsel of Choice.

By waiting until the last minute, the trial court foreclosed all of Petitioner's options in representation, further impeding his exercise of his constitutional right. Because the trial court left Petitioner with less than a month, Petitioner did not have the time to locate qualified counsel with sufficient time to prepare for trial. Thus, Petitioner was left with one avenue—to hire the lawyer, initially retained for limited purposes, to try the case in its entirety on short notice.

Had the trial court ruled on Mr. Meenan's application for a *pro hac vice* appearance as soon as the application was submitted or even when Mr. Meenan first made it known to the court on June 20, 1997 that his appearance might cause a four-day delay, Petitioner would have had a better opportunity to secure competent counsel. In other words, although his constitutional right would still have been violated, Petitioner would have had a better opportunity to exercise his qualified right to counsel of choice than he was given by the court's untimely delay.

CONCLUSION

This Court as well as lower courts have long recognized the Fourteenth Amendment Due Process right of a civil litigant to counsel of choice that cannot be defeated arbitrarily. Even considerations of time and delay must give way to this right when there is an overriding need for a particular lawyer. In the present case, the trial court ignored Petitioner's Due Process right, denying Mr. Meenan's application arbitrarily even though there was a clearly overriding need for Mr. Meenan's representation. Therefore, Petitioner's petition for writ of certiorari should be granted.

Respectfully submitted,
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November 8, 1999

DECISION AND ORDER OF THE HON. RENEE ROTH,
DATED MAY 29, 1997

SURROGATE'S COURT : NEW YORK STATE
COUNTY OF NEW YORK
----------X
Application of RICHARD C. LENG, ESQ.,
for permission to withdraw as counsel
for objections in the probate proceeding,
Will of ABRAHAM WARSASKI

File No. 4323/93

Deceased.
----------X

ROTH, S.

In this contested probate proceeding in the estate of Abraham Warsaski, objectants' counsel seeks permission to withdraw from his representation.

The facts are briefly stated. Testator died on May 19, 1993, survived by his nephews, Marshall and Michael Spiegel. Under the propounded instrument, he disposed of his estate to various charities and disinherited his nephews, who filed objections to one will. During the initial stages of this proceeding, objectants, who live in Illinois, appeared *pro se*. Thereafter, they appeared by Richard C. Leng, an Illinois attorney, who was admitted *pro hac vice* and represented

them in various proceedings, including a summary judgment motion and appeal, discovery, pre-trial motions and trial preparation. The probate trial, originally scheduled for March 10, 1997, was adjourned because of the actual engagement of proponent's counsel.

An attorney may terminate his relationship with his clients for good cause and upon reasonable notice. *Matter of Dunn*, 205 NY 396; see also CPLR §321 [b][2]). Here, it appears that irreconcilable differences have arisen between Mr. Leng and his clients. Also, after the motion was submitted, the Court was informed that objectants had consulted another attorney to represent them in Mr. Leng's place. Accordingly, in the absence of a showing that Mr. Leng's withdrawal would have a material adverse effect on objectant's interest, the motion is granted.

The rules of admission *pro hac vice* have been changed and now provide that any court, in its discretion, may admit an out-of- state attorney to participate in any matter, but that no attorney may be admitted *pro hac vice* unless he or she is associated with an attorney who is a member of the New York bar, who shall be attorney of record (Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, 22 NYCRR §520.11[b]). The objectants are therefore advised that this Court will not admit another out-of-state attorney *pro hac vice* unless associated with a New York attorney who shall be attorney of record.

Mr. Leng, who is directed to turn over his file in this matter to objectants or their new counsel, shall have a lien for the balance of his compensation, if any, which shall be fixed at the conclusion of the probate proceeding. Further proceeding are stayed for thirty (30) days from the date of service of a copy of this order with notice of entry on both objectants.

The parties shall select a jury on September 5, 1997 at 10 AM and the trial shall commence on September 8, 1997 and 10 AM or as soon thereafter as possible. Mr. Leng is directed to serve a copy of this order with notice of entry on both objectants, counsel for proponent and the Attorney General within 15 days of the date hereof and to file proof of such service with this court.

This decision constitutes the order of the court.

S U R R O G A T E

Dated: May 29, 1997